United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

75-6120

To be argued by: Patrick J. Glynn

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

B

P/S

ALBERT M. BILLITERI,

Plaintiff-Appellee,

v.

UNITED STATES BOARD OF PAROLE and MEMBERS OF THE UNITED STATES BOARD OF PAROLE, Individually and in Their Official Capacity, and UNITED STATES OF AMERICA,

Defendants-Appellants.

On Appeal from the United States District Court for the Western District of New York

REPLY BRIEF OF APPELLANTS

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IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 75-6120

ALBERT M. BILLITERI,

Plaintiff-Appellee,

v.

UNITED STATES BOARD OF PAROLE and MEMBERS OF THE UNITED STATES BOARD OF PAROLE, Individually and in Their Official Capacity, and UNITED STATES OF AMERICA,

Defendants-Appellants.

REPLY BRIEF OF APPELLANTS

I. THE DISTRICT COURT LACKED JURISDICTION.

A. The Administrative Procedure Act Did Not Provide Subject Matter Jurisdiction.

In repsonse to our arguments that the Administrative Procedure Act (APA), 5 U.S.C. §701 et seq., is not an independent grant of subject matter jurisdiction, the plaintiff has merely asserted that he agrees with the reasoning in Sanders v. Weinberger, 522 F.2d 1167 (7th Cir. 1975).[1/] Although the Sanders case held that the APA was an independent basis of jurisdiction, a

1/ Without discussion, plaintiff also cited a law review article, Byse and Fiocca, Section 1361 of the Mandamus and Venue Act of 1962 and "non-statutory" Judicial Review of Federal Administrative Action, 81 Harv. L. Rev. 308 (1967), and another Seventh Circuit case. King v. United States, 492 F.2d 1337 (1974). But this Court found the same law review article not to be dispositive of the APA jurisidction question in Aguayo v. Richardson, 437 F.2d 1090, 1102 (1973). And the King case based jurisdiction not on the APA but on 28 U.S.C. §1361, which is discussed infra.

proposition we dispute for the reasons stated in our opening brief, the reasoning of Sanders would not support a finding of jurisdiction in the present case. In Sanders, the Seventh Circuit indicated that the particular section of the APA which conferred subject matter jurisdiction was 5 U.S.C. §704, which "authorizes judicial review of final agency action for which there is no other adequate remedy in a court. . . " 522, F.2d 1169-1170. But in the present case Billiteri had another adequate remedy available to him: a petition for a writ of habeas corpus in the Middle District of Pennsylvania. Consequently, §704, even as interpreted in Sanders, would be inapplicable to Billiteri's situation.

Significantly, the same section of the APA was found to be the source of jurisdiction in Bradley v. Weinberger, 483 F.2d 410 (1st Cir. 1973). Thus, two of the circuits which find any APA jurisdiction at all would find none in this case.

B. The District Court Did Not Have Mandamus Jurisdiction.

Although jurisdiction under 28 U.S.C. §1361 was not discussed by the district court, the plaintiff has suggested that provision as an alternative to the APA jurisdiction found by the district court. In response to our arguments that habeas corpus was the only proper remedy for Billiteri's claims, the plaintiff has referred the Court to two military cases in which mandamus was held to be appropriate whether or not habeas corpus was also available. Schoenbrum v. Commanding Officer, 403 F.2d 371, 374 (2d Cir. 1968), and Lovallo v. Froehlke, 468 F.2d 340 (2d Cir. 1972). But a reading of those decisions shows that they were far different from this case. First, the Court was unable to say with certainty whether habeas corpus would be proper in either of those cases. Furthermore, habeas corpus jurisdiction would have been available in the same district court in each of those cases, since each

of those petitioners named as a respondent his commanding officer and brought the case in the district of that commanding officer. It is most significant that the author of the Schoenbrum opinion, Judge Friendly, has recently stated that, in the context of federal prisoner claims, ". . .except in extraordinary circumstances, Sec. 1361 is not available and Sec. 2241 is the exclusive remedy!" Kahane v. Carlson, No. 75-2088 (2d Cir., Nov. 26, 1975), Slip Op. at 7 (concurring opinion).

The soundness of Judge Friendly's approach is supported by mandamus principles dating back to Marbury v. Madison, 1 Cranch 137 (1803). It is axiomatic that mandamus is appropriate only where there is no other adequate remedy available. Marbury v. Madison, supra, at 168; United States ex rel Girard Trust Co. v Helvering, 301 U.S. 540, 544 (1937); Amaya v. Board of Parole, 486 F.2d 940, 943 (5th Cir. 1973); Grant v. Hogan, 505 F.2d 1220, 1225 (3d Cir. 1974). The plaintiff does not dispute that habeas corpus was a remedy available to him in this case. In fact, he contends that the habeas corpus statute provided jurisdiction for the court below. (Br. at 26-32). Under these circumstances the extraordinary remedy of mandamus should not be allowed.

But there is another compelling reason why mandamus is inappropriate in this case. Mandamus will only lie when the plaintiff has a clear right to the relief sought and there is a plainly defined, peremptory duty on the part of the defendant to do the act in question. Fifth Avenue Peace Parade v. Hoover, 327 F. Supp. 238; 242-243 (S.D.N.Y. 1971); United States v. Walker, 409 F.2d 477, 481 (9th Cir. 1969); McGaw v. Farrow, 472 F.2d 952, 956-957 (4th Cir. 1973). But these requirements are not met in the case at bar. There is no clear legal right to the relief plaintiff sought. Instead, he raised a novel and complex issue concerning the permissible scope of the Parole Board's

inquiry in making parole decisions.[2/]

In Fifth Avenue Peace Parade v. Hoover, supra, the plaintiffs alleged that the FBI had violated various constitutional rights by its surveillance of their activities. Like Billiteri, however, they could point to no specific directive requiring the defendants to do, or not to do, specific acts. Accordingly Judge Tyler held:

> . . . a court must have the benefit of some specific statutes or regulations against which to measure the duties said to have been specifically ignored by the defendant or defendants. Plaintiffs have not made such a showing here. They rest upon the flat assertion that defendants have a duty not to violate the constitutional rights of plaintiffs. Although the proposition cannot be denied, I think that to allow it as a basis for federal jurisdiction would be to stretch mandamus far beyond its proper limits 327 F. Supp. at 243.

Similarly in his concurring opinion in Kahane v. Carlson, supra, Judge Friendly, stressed that claims based on doubtful or debatable interpretations of statutory terms were not appropriate for mandamus relief. Slip Op. at 3.

Neither the plaintiff nor the district court could point to any clearly defined duty on the part of the Parole Board to parole Billiteri or to rate his offense behavior in any particular severity category. Instead the court resorted to a complex line of reasoning to conclude that Billiteri's offense behavior could not be "very high" severity; that not having reached the organized crime issue in the January, 1975, decision the Board could never consider it in

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2/ As discussed infra, the plaintiff contends that the issues involved here are are the procedural requirements for a parole hearing. But those issues too are far different form the settled, plainly defined rights suitable for mandamus.

furture decisions; and that the Board could not make a decision outside of its guidelines in Billiteri's case. Finally, the actual relief granted by the district court, an order directing the Board to parole Billiteri, could hardly be characterized as an appropriate exercise of mandamus jurisdiction.

For all of these reasons, mandamus would have been an improper jurisdicitional basis to support the decision of the district court.

C. The Court Below Did Not Have Habeas Corpus Jurisdiction.

Billiteri contends that the district court had habeas corpus jurisdiction in this case pursuant to 28 U.S.C. §2241 for two reasons: first, because the named defendants, the Parole Board and Board members, waived any objection to the court's personal jurisdiction over them and second, because there were "agents" of the Parole Board in the Western District of New York, having significant contacts with the case. Both theories miss the point.

The relevant habeas corpus statutes require that the court issuing the writ have jurisdiction over the prisoner's custodian. The general habeas statute, 28 U.S.C. §2241, specifies that "[w]rits of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions." (Emphasis added). The emphasized language has most recently been held to require that the court have jurisdiction over the custodian who can bring the prisoner before the court and give him an outright release from custody. Braden v. 30th Judicial Cirucit Court of Kentucky, 410 U.S. 484, 485 (1973). Furthermore, §2243 provides that "[t]he writ, or order to show cause shall be directed to the person having custody of the person detained." Billiteri's custodian was the warden of the United States Penitentiary, Lewisburg, Pennsylvania. But under no theory was that warden within the jurisdiction of the Western District of New York.

Billiteri, of course, contends[3/] that the Parole Board and its members are proper habeas respondents because they hold the paroling power. (Br. at 27). But parole is only the discretionary power to change the circumstances of custody from incarceration to community supervision. The paroling power does not make the Parole Board a custodian of a prisoner any more than the pardoning power makes the President a custodian. It is a fundamental habeas corpus principle that a prisoner's custodian is his jailer. See Wales v. Whitney, 114 U.S. 564, 574 (1885); Jones v. Biddle, 131 F.2d 853 (8th Cir. 1942); Sanders v. Bennett, 148 F.2d 19, 20 (D.C. Cir. 1945); Lee v. United States, 501 F.2d 494, 500 (8th Cir. 1974); and Harrington v. Schotfeldt, 139 F.2d 935 (7th Cir. 1943), cert. denied 327 U.S. 781.

The fact that the issues in a habeas claim are directed against Parole Board rather than prison actions does not alter this rule. In Battle v. Norton, 365 F. Supp. 925 (D. Conn. 1973), the court explained the use of habeas corpus in parole cases as follows:

> Even if a favorable parole decision can in no event be judicially required, Tarlton v. Clark, 441 F.2d 384 (5th Cir. 1971), a proposition accepted even by the dissenting opinion in Scarpa [v. Board of Parole, 477 F.2d 278 (5th Cir. 1973)], it does not follow that a warden could not be ordered to release a prisoner held after parole had been denied in an unlawful manner. Presumably the Board would be given time to correct its error, if such were found, not unlike a state court's being permitted to retry a state prisoner unconstitutionally convicted. 365 F. Supp. at 927.

Cf. Grasso v. Norton, 376 F. Supp. 116 (D. Conn. 1974), aff'd, (with modification) 520 F.2d 27 (2d Cir. 1975).

3/ In support of this assertion, plaintiff has curiously cited a case in which the prisoner's warden was the respondent in a habeas action challenging a parole denial. Buchanan v. Clark, 446 F.2d 1379 (5th Cir. 1970).

Even though the government defended this case on the merits in the district court, the absence of Billiteri's jailer as a habeas respondent was fatal to jurisdiction under 28 U.S.C. §2241. This Court recently had occasion to discuss the same issue in United States v. Huss, 520 F.2d 598 (2d Cir. 1975). In Huss the only parties before the Court were two federal prisoners and the United States. The case was brought in the district where the prisoners were confined, and the prisoners' jailer testified in the district court proceedings. But the Court held that the failure to name and serve that warden as a habeas corpus respondent defeated §2241 jurisdiction.

Billiteri relies on Strait v. Laird, 406 U.S. 341 (1972), for the proposition that his contacts with government authorities in the Western District of New York create an appropriate habeas respondent in that district. This reliance is misplaced. Strait held that the contacts with an Army reservist in California rendered his Indiana-based nominal commander present in California for habeas purposes. Because of the conceptual differences between military "custody" and prison custody, the military habeas decisions have little value for prison directed habeas cases.[4/] Moreover, Strait is seemingly contrary to Schlanger v. Seamans, 401 U.S. 487 (1971). But Strait is even further distinguishable on its facts from the present case. The extraterritorial contacts of the commander in Strait led to a finding of his presence in California, where Strait was in "custody." But Billiteri was not in custody in the Western District of New York and his contacts with government officials there were prior to his custody. Billiteri's contacts with the government's custodial officers were only in the Middle District of

4/ Strong policy reasons also militate against the extension of habeas jurisdiction in prison cases to multiple districts. Starnes v. McGuire, 512 F.2d 918 (D.C. Cir. 1974). The most important of these considerations is the threat of inconsistent rulings in the custodial district and other districts of alleged "contacts." Cf. Benson v. Bijeol, 513 F.2d 965 (7th Cir. 1975).

Pennsylvania.

Therefore, although habeas corpus is the appropriate vehicle for the claims Billiteri raised, the Western District of New York lacked the power to grant the writ because it does not have jurisdiction over Billiteri's custodian.

II. THE DISTRICT COURT ERRED IN RULING THAT BILLITERI'S OFFENSE BEHAVIOR COULD NOT BE CONSIDERED "VERY HIGH" SEVERITY.

It is admittedly difficult to distill from the three district court opinions the exact reasoning utilized by the court to order Billiteri's parole, but we submit that the plaintiff has needlessly scrambled the issues on this appeal by rearguing his entire district court case.

"Point V" of the plaintiff's brief, for instance, attacks Judge Curtin's finding that Billiteri was a member of organized crime. But that finding has never been designated as an issue of any appeal or cross appeal in this case. Similarly, plaintiff's "Point II" is devoted to claims of procedural due process deprivations in the various proceedings conducted by the Board of Parole.[5/] But while it cannot be denied that Judge Curtin expressed the

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5/ Although we do not believe they are of direct relevance to this appeal, we submit that Billiteri's procedural claims are without merit. Those claims of due process deprivations are premised on this Court's decisions in Johnson v. Chairman, New York State Board of Parole, 500 F.2d 925 (1974) and Cardaropoli v. Norton, 523 F.2d 990. (Appellee's Brief at 33 et seq.). But Johnson required only a statement of reasons for parole denial, and the district court has not suggested that the Parole Board's January, 1975, decision was deficient on that point. Cardaropoli, on the other hand, did not even deal with the parole process but with the Bureau of Prisons "special offender" classification. Although the Parole Board's original jurisdiction procedure appears to be similar, it is significant that the author of Catalano v. United States, 383 F. Supp. 346 (D. Conn. 1975), on which Cardaropoli was based, has found that the Board's original jurisdiction procedure does not implicate due process requirements. See Biancone v. Norton, Civil No. B-74-473 (D. Conn. Nov. 19, 1975) and Cardaropoli v. Norton, Civil No. B-74-467 (D. Conn. Dec. 15, 1975) (copies appended). Billiteri has cited no precedent for his assertion that disclosure of the presentence report was required. The cases decided on that point indicate that such disclosure is not required. See Fisher v. United States, 382 F. Supp. 241, 243-244 (D. Conn. 1974); Wiley v. Board of Parole, 380 F. Supp. 1194, 1200 (M.D. Pa. 1974); Cook v. Whiteside, 505 F.2d 32

utmost scorn for the Board's procedures in Billiteri I, he chose not to make any procedural due process holdings the basis for an appealable final order. Instead, the district court conducted its own hearing with elaborate adversari procedures and reached the conclusion that the Parole Board was obligated to rate Billiteri's offense behavior in such a low severity category of its guidelines as to require immediate parole. Thus, Judge Curtin's criticisms of the Board's procedures, under whatever theory[6/], must be taken as dicta because the final order requiring Billiteri's release was based on the separate, substantive issue of the offense severity rating.[7/]

Billiteri's Brief purports not to dispute the Parole Board's contention that it may consider the circumstances of his actual offense behavior beyond the narrow terms of his guilty plea. (Br. at 43-45). Instead, Billiteri merely repeats the district court's statement that the five year maximum sentence of the general conspiracy statute, 18 U.S.C. §371, precludes the Parole Board from ever considering a person convicted of conspiracy to have displayed an offense behavior as serious as any extension of extortionate credit, which carries a 20 year maximum sentence. 18 U.S.C. §892[8/]. But that reasoning would

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5/ (continued from previous page)
(5th Cir. 1974). Furthermore, it should be noted that the presentence report is a court document which the Board of Parole has been forbidden to disclose. See 40 Fed. Reg. 41328 (Sept. 5, 1975).

6/ It is unclear whether Judge Curtin based his rejection of the Board's procedures on constitutional, statutory, or regulatory requirements or on some other theory. The only explanation offered by the court was that the Board's second parole consideration did not comply with the remand directions in Billiteri I. Billiteri III, 400 F. Supp. at 405 (App. 221). This explanation has been a mystery to the Board, however, because Billiteri I did not articulate any special procedures to be followed at the remand hearing and did not suggest that the Board's established procedures were inadequate.

7/ Since the district court took the novel approach of conducting its own hearing to correct the deficiencies it perceived in the Board's hearings, it must be assumed that the court considered all procedural requirements to have been satisfied when it addressed the substantive issue of the offense severity rating.

8/ It is noteworthy that the offense to which Billiteri pleaded guilty, conspiracy to make an extortionate extension of credit, can result in up to 20

effectively prohibit the consideration of anything more than the statutory section to which a defendant pleads guilty. It would require the Board of Parole to rate every prisoner's offense behavior according to some formula based on the statutory maximum for the offense of conviction, thereby preventing the consideration of the particular aggravating or mitigating circumstances of an individual prisoner's behavior. Carried to its logical extreme, it would require that Billiteri's offense behavior be considered the same severity level as any other five year felony, such as defacing a coin. See 18 U.S.C. §331. Congress could hardly have intended that kind of mechanical extension of its scheme of maximum sentences. Those maximum sentences have been established simply as the upper limits of the court's sentencing discretion. If sentences are imposed within those limits, the statutes have been complied with. The conspiracy statute permits one convicted under it to be incarcerated for up to five years, less good time. The sentencing judge and the Board of Parole have not attempted to make Billiteri to serve a longer period.

Billiteri also repeats the district court's conclusion that the plea bargain in this case somehow bound the Board of Parole to ignore the aggravating details of the offense behavior. (Appellee's Brief at 45). But the Parole Board was not a party to that bargain. Government prosecutors have no more authority to promise a favorable parole disposition than to promise a favorable sentencing disposition. There has been no suggestion that any such promise was made in this case. Billiteri received the substantial benefit which he bargained for: a sentence of no more than five years. He was entitled to no more. Cf. Selikoff v. New York State Comm'n of Corrections, ____ F.2d ____,

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8/ (continued from previous page)
years imprisonment:

> Whoever makes an extortionate extension of credit, or conspires to do so, shall be fined not more than $10,000 or imprisoned not more than 20 years, or both, (emphasis added). 18 U.S.C. §892(a).

18 Crim. L. Rep. 2139 (2d Cir. Oct. 21, 1975).

There can be little doubt that the actual circumstances of Billiteri's offense behavior involved more than the mere planning of extortionate loans which he admitted at his plea proceeding. (App. 380). The summary of the offense presented by the government at that proceeding and described by the probation office in the presentence report, (App. 398-404), portrayed a conspiracy that was actually carried out. But at the adversarial "parole" hearing before Judge Curtin, Billiteri offered nothing to contradict the summary of the offense in the presentence report, which the court had ordered disclosed to him. (App. 239-368). Moreover, when Billiteri was questioned about the details of his offense behavior at his December, 1974, parole hearing, he admitted that his conspiracy was actually carried out: ". . . we did conspire to loan some money. We did actually loan some money." (App. 106).

The district court has reached a decision requiring Billiteri's parole by directing the Board to apply its guidelines to Billiteri in a way that conflicts with the Board's intended use of those guidelines and with the facts on the record. This judicial editing of history cannot be justified by the novel theories constructed by the district court regarding statutory maximum sentences and the plea bargaining process.

CONCLUSION

For these reasons, we urge that the judgment of the district court be vacated for lack of jurisdiction or reversed on the merits.

Respectfully submitted,

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DATED: February 17, 1976

Patrick J. Glynn

PATRICK J. GLYNN

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

JOSEPH BIANCONE :

v. : CIVIL NO. B-74-473

JOHN J. NORTON, Warden, :
Federal Correctional Institution,
Danbury, Connecticut :

MEMORANDUM OF DECISION

Petitioner, presently incarcerated at the Federal Correctional Institution, Danbury, Connecticut, seeks judicial relief from a decision of the Board of Parole (hereinafter "Board") denying him parole. He contends that (1) the Board improperly designated his case as one within the "original jurisdiction" of the Regional Directors, 28 C.F.R. § 2.17 (1974); (2) the Board's application of the parole policy guidelines, 28 C.F.R. § 2.20, was inconsistent with applicable case law; and (3) he is entitled to immediate release because he is suffering from a fatal disease. An evidentiary hearing was held by this Court and comprehensive briefs have now been filed.

I

On March 6, 1972, the petitioner commenced service of a ten-year sentence imposed by the District Court for the District of New Jersey, Barlow, J., following a conviction for multiple acts of extortion, in violation of the Hobbs Act, 18 U.S.C. § 1951. Soon thereafter, medical examination

revealed that the petitioner was inflicted with polycythemia vera, an incurable form of blood cancer. Upon learning that the petitioner had a terminal illness, Judge Barlow, on June 20, 1973, modified the petitioner's sentence by ordering that he should become eligible for parole at such time as the Board may determine, pursuant to the provisions of 18 U.S.C. § 4208(a)(2).

On August 28, 1973, petitioner received an initial parole hearing before two hearing examiners of the Board. However, his case was thereafter submitted for an en banc consideration of the members of the Board as an "original jurisdiction" matter because of the "national or unusual attention" given to petitioner's criminal activity. See 28 C.F.R. § 2.17(a),(b)(3). On September 24, 1973, petitioner was informed that the Regional Directors decided to continue his incarceration with an institutional review in January, 1976. In addition, the Board instructed the prison officials to notify it if the petitioner's health should reach a critical state. No reasons were given for the denial of parole.

Following a request by Judge Barlow, the Board re-opened petitioner's case on March 11, 1975 for an original jurisdiction review on the record. Two months later, the Board reaffirmed its prior decision with these reasons:

> Your offense behavior consisted of multiple separate offenses. The offense was part of an ongoing large scale organized criminal conspiracy, including Interstate Extortion involving conspiracy to obstruct, delay and

effect (sic) interstate commerce.

On appeal, the National Appellate Board affirmed the denial of parole, commenting in part that the petitioner's offense behavior was rated as "greatest severity" due to the "magnitude of your involvement and the effect it had on the functioning of a major city because of corruption at a high governmental level."

On August 25, 1975, petitioner received his second parole hearing pursuant to a recently adopted Board practice of conducting review hearings at the one-third point in § 4208(a)(2) sentences. At that hearing petitioner was advised by the hearing examiner panel that his case would be referred to the Regional Director for original jurisdiction processing because of the notoriety surrounding his offense. However, when the case was considered by the Regional Director, he did not designate it for an original jurisdiction decision but let the alternative decision of the hearing examiners stand as the decision of the Board. That examiner panel decision was the same as all previous orders in the case: continued with an institutional review hearing in January, 1976. The reasons for parole denial were stated as follows:

> Your offense behavior has been rated as greatest severity because your offense consisted of multiple separate offenses. Instant offense was part of a large scale organized criminal conspiracy including interstate extortion and involving conspiracy to obstruct, delay and effect interstate commerce. You have a salient factor score of 11. . . . You have been

> in custody a total of 41 months. Guidelines established by the Board for adult cases which consider the above factors indicate a range of unlimited months to be served before release for cases with good institutional program performance and adjustment. After careful consideration of all relevant factors and information presented, it is found that a decision outside the guidelines does not appear warranted. Board guidelines for greatest severity cases do not specify a maximum limit. Therefore, the decision in your case has been based in part upon a comparison of the relative severity of your offense behavior with offense behavior examples listed in the very high severity category.

Subsequently, on September 29, 1975, the Regional Director cancelled the above order and once again designated the case an original jurisdiction matter. On the same date an original jurisdiction order was issued by the Board reaching the same decision as the examiner panel: continued for institutional review hearing in January, 1976. The reasons stated for parole denial were substantially the same as the reasons given for the examiner panel's decision.

II

The petitioner first attacks the Board's practice of designating cases for "original jurisdiction" on the basis of the publicity connected with a defendant's arrest, trial and conviction. 28 C.F.R. 2.17(a),(b)(3). He argues that "notorious" prisoners should receive the same procedural treatment for parole purposes as "non-notorious" inmates. The Court disagrees.

It is undisputed that the criminal case in which the

petitioner was involved provoked widespread public interest and publicity. He and several prominent public officials of the State of New Jersey, including the Mayor of the City of Newark, were charged in a 66-count indictment with multiple violations of the Hobbs Act in connection with certain municipal projects undertaken by the City. At his trial the petitioner moved for a change of venue and submitted to the trial judge eight volumes of newspaper and magazine clippings to support his claim that pre-indictment publicity had engendered so great a prejudice against him that he could not obtain a fair trial in the District of New Jersey. See United States v. Addonizio, 313 F.Supp. 486, 493-494 (D. N. J.), affd. 451 F.2d 49 (3 Cir.), cert. denied 405 U.S. 936 (1972).

These circumstances prompted the Board to consider en banc petitioner's application for parole. The evidence at the hearing before this Court indicates that the "original jurisdiction" classification is a procedural device to insure that, with respect to certain inmates who apply for parole,[1/] the tentative decisions of the two parole examiners in the prison are reviewed at the highest level in the parole process. The substantive standards for parole release remain the same; only the decision-making body differs. It is apparent that the "original jurisdiction" designation provides an effective method to promote public confidence in the parole system by assuring that final parole decisions likely to attract community or national attention are made

by the chief administrative officials of the Board of Parole. While it may be true that fewer releases are granted to "original jurisdiction" inmates on their initial applications for parole than other prisoners who are not so classified, the Court is satisfied that this is due to the seriousness and nature of the offenses involved and not the result of any constitutionally proscribed procedure in the decision-making process. Thus, the petitioner has failed to demonstrate that in his case the parole procedure which accompanies an "original jurisdiction" designation constitutes a "grievous loss" which may not be imposed in the absence of additional and separate due process safeguards. Cf. Wolff v. McDonnell, 418 U.S. 539 (1974); Morrissey v. Brewer, 408 U.S. 471 (1972); Cardaropoli v. Norton, ___F.2d ___ (2 Cir. September 29, 1975). See also Wiley v. United States Board of Parole, 380 F.Supp. 1194 (M.D. Pa. 1974).

III

The petitioner next challenges the validity of the Board's reasons for parole denial. First he contends that, although the policy guideline table rates the crime of extortion as "very high", the Board erroneously placed his offense in the "greatest" category. Since the petitioner has a salient factor score of 11, the "very high" rating calls for a period of incarceration of between 26 and 36 months; but the "greatest" severity category suggests imprisonment beyond 65 months. Thus, petitioner argues, with

a "very high" category assignment he is entitled to an immediate parole release because he has been in custody over 40 months.

However, the table of severity categories serves only as a guideline. In appropriate circumstances the Board may increase the severity level. 28 C.F.R. § 2.20(d)(1975); United States v. Manderville, Crim. No. H-74-133 (D. Conn. July 30, 1975); Battle v. Norton, 365 F.Supp. 925, 929 (D. Conn. 1973). Under the facts of this case, the Board did not abuse its discretion when it determined that aggravating circumstances merited a severity rating in the "greatest" category.

Second, the petitioner asserts that the Board's failure to notify him until July 30, 1975 that his offense severity was "greatest" deprived him of the opportunity to be heard and to contest that assignment at his parole hearing before the two examiners. The argument is without merit.

Prior to October 1, 1973, the Board was not required to state reasons for parole denial or to advise the inmate of his status under the guidelines, and, accordingly, petitioner did not receive a statement of reasons for the denial of parole in August and September, 1973. See 28 C.F.R. § 2.15, as amended 38 Fed. Reg. 26653 (September 24, 1973). However, in May, 1975, the Board informed the petitioner that he would not be released on parole for various reasons which clearly indicated his case contained "aggravating" circumstances under § 2.20(d), and, in May, 1975, he was expressly

notified that his offense was viewed as "greatest" severity. On appeal and later in August, 1975 at his institutional hearing, he had ample opportunity to be heard, to present countervailing evidence, and to challenge fully his classification. More was not required. See Lupo v. Norton, 371 F.Supp. 156, 162 (D. Conn. 1974).

IV

Finally, petitioner contends that his short life expectancy renders his parole treatment cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution. At the hearing before this Court, medical testimony was received from two physicians, Dr. Leonard Farber, a specialist in hematology, and Dr. Louis Rogol, Chief Health Officer at the Danbury institution. The testimony as to petitioner's life expectancy was inconclusive. Although Dr. Farber testified to a diagnosis in 1972 which placed petitioner's life expectancy at three to five years, he stated that petitioner could probably live as long as 12 years. The Board is aware of petitioner's condition and has indicated that prison officials should advise the Board if his health reaches a critical stage (Notice of Action, May 23, 1975). Dr. Farber and Dr. Rogol both testified that the course of treatment that petitioner was receiving at Danbury was adequate. Under these circumstances, the Court finds that continued incarceration of the petitioner does not constitute cruel and

unusual punishment.

Accordingly, the petition for a writ of habeas corpus is denied; the petition is dismissed.

Dated at New Haven, Connecticut, this 18th day of November, 1975.

Robert C. Zampano
United States District Judge

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

PAUL J. CARDAROPOLI :

v. : CIVIL NO. B-74-467

JOHN J. NORTON, Warden, Federal Correctional Institution, Danbury, Connecticut and MAURICE J. SIGLER, Chairman, United States Board of Parole :

MEMORANDUM OF DECISION

Petitioner, presently incarcerated at the Federal Correctional Institution, Danbury, has sought habeas relief from this Court on several occasions. On October 17, 1974, the Court ordered the Bureau of Prisons to expunge petitioner's "Special Case" classification unless he was accorded due process rights, Cardaropoli v. Norton, Civil No. B-74-86 (D. Conn.), aff'd. _____ F.2d _____ (2 Cir. September 29, 1975). Now, petitioner seeks relief from a decision by the United States Board of Parole denying him parole and designating him an "Original Jurisdiction" case.

The moving papers disclose that on May 14, 1973, petitioner was sentenced to serve a five-year term of imprisonment pursuant to 18 U.S.C. § 4208(a)(2). He had a parole hearing in March, 1974, and was treated as an "Original Jurisdiction" case because of his alleged involvement with organized crime. 28 C.F.R. § 2.17(b)(2) (June 5, 1974). Petitioner then received an en banc consideration for parole

in Washington, D.C., and was ordered continued to expiration with a review on the record in December, 1974.

Petitioner attacks this en banc decision because he was never notified of nor given an opportunity to contest his designation as an "Original Jurisdiction" case. However, under the circumstances of this case, the Court finds that the petitioner has not suffered a "grievous loss" necessary to invoke due process safeguards from his "Original Jurisdiction" designation. See Biancone v. Norton, Civil No. B-74-473 (D. Conn. 1975); cf. Catalano v. Norton, 383 F.Supp. 346 (D. Conn. 1974).

The "Original Jurisdiction" classification is a procedural device to insure that, with respect to certain inmates who apply for parole,[1/] the tentative decision of the two parole examiners in the prison is reviewed at the highest level in the parole process. The substantive standards for parole release remain the same; only the decision-making body differs.

Petitioner received an institutional hearing concerning his parole release during which time he personally appeared before a panel of hearing examiners. His hearing was identical with that afforded all prisoners and he had an ample opportunity to present all evidence favorable to an early parole. As a result of this initial hearing in March, 1974, the petitioner was recommended for a Regional Director's en banc hearing as an "Original Jurisdiction" case, or, alternatively, to continue his sentence to expiration. The

en banc review of petitioner's record also resulted in a decision to continue his sentence to expiration. This en banc decision was affirmed by the National Appellate Board on May 29, 1974. In December, 1974, petitioner had a review on the record of his parole status, cf. Grasso v. Norton, ____ F.2d ____ (2 Cir. June 23, 1975), and received the same decision.

Petitioner has been incarcerated for 31 months. He has a salient factor score of six and an offense characteristic of "very high" which, under the Parole Board guidelines, 28 C.F.R. § 2.20 (June 5, 1974), indicate incarceration for 36-45 months. At no point in the parole process has petitioner's designation as an "Original Jurisdiction" case affected his parole release to the point of exceeding the appropriate guideline time. The Court is satisfied that the Parole Board's refusal to accord petitioner early parole release is due to the seriousness and nature of his offense [2/] and not the result of any constitutionally proscribed procedure in the decision-making process. See Biancone v. Norton, supra.

Accordingly, the petition is dismissed.

Dated at New Haven, Connecticut, this 12th day of December, 1975.

Robert C. Zampano
United States District Judge

FOOTNOTES

1/ The four categories of "original jurisdiction" cases are set forth in 28 C.F.R. § 2.17 (1975) as follows:

(1) Prisoners who have committed serious crimes against the security of the Nation, e.g., espionage, or aggravated subversive activity.

(2) Prisoners whose offense behavior (A) involved an unusual degree of sophistication or planning or (B) was part of a large scale criminal conspiracy or a continuing criminal enterprise.

(3) Prisoners who have received national or unusual attention because of the nature of the crime, arrest, trial, or prisoner status, or because of the community status of the offender or his victim.

(4) Long term sentences. Prisoners sentenced to a maximum term of forty-five years (or more) or prisoners serving life sentences.

2/ On February 14, 1975, the petitioner received a Notice of Action from the Parole Board stating that " a decision outside the guidelines at this time does not appear warranted because the offense was part of an organized criminal conspiracy and on-going criminal enterprise." The Court notes that the Second Circuit held in United States ex rel. Johnson v. Chairman, New York State Board of Parole, 500 F.2d 925, 934 (2 Cir. 1974) that due process requires the Board of Parole to furnish the inmate both the grounds for its decision and "the essential facts upon which the Board's inferences are based." While not ruling on the adequacy of the Board's reasons for denying petitioner parole, the Court feels constrained to state that failure to give full and complete facts explaining denial of parole release may vitiate the efficacy of the administrative appeal process, see Lupo v. Norton, 371 F.Supp. 156, 162 (D. Conn. 1974), and cause judicial intervention more frequently than necessary in the parole process.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that two copies of the foregoing Reply Brief were mailed to:

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DATED: February 17, 1976

Patrick J. Glynn

PATRICK J. GLYNN